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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1527

FLORIDA MACHINE & FOUNDRY COMPANY and FLECO CORPORATION, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported; its initial opinion (Pet. App. 7a-22a) remanding the case to the Board is reported at 441 F. 2d 1005. The Board's initial decision (Pet. App. 23a-62a) is reported at 174 NLRB 1156, and its decision after remand (Pet. App. 4a-6a) is reported at 190 NLRB No. 109.

JURISDICTION

The judgment of the court of appeals (Pet. App. 3a) was entered on February 25, 1972. The petition for a writ of certiorari was filed on May 23, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that the company failed to bargain in good faith with the union.

2. Whether substantial evidence supports the Board's finding that the strike was caused by the company's unlawful refusal to bargain and that therefore the company violated Section 8(a)(3) of the National Labor Relations Act by discharging and refusing to reinstate its striking employees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 62a-66a.

STATEMENT

A. The Board's Findings of Fact

On October 3, 1966, the United Steelworkers of America, AFL-CIO, was certified as the bargaining agent of the Company's production and maintenance employees at its Jacksonville, Florida, machinery

parts production plant (Pet. App. 32a). During the election campaign which preceded the certification, Company management personnel consistently asserted that, even if the Union prevailed in the election, the Company would never enter into contractual relations with it (Pet. App. 30a-32a; A. 222-223, 235, 252-253, 271-272, 282, 291).[1]

The Union submitted its initial written contract proposal to the Company on October 10 (Pet. App. 32a; A. 402-403, 77-97). The first bargaining session occurred on November 28 (Pet. App. 32a; A. 382). At that session, the parties reviewed the Union's proposed contract, and agreed on several matters (Pet. App. 32a-33a). Company attorney Bowden said he would prepare a counterproposal for submission to the Union (Pet. App. 33a; A. 423). The Union urged, without success, that the Company agree "to meet as soon as possible, preferably in a succession of days, so the negotiations would have some consistency and flow." The Company, however, would not agree to meet again until December 19 (*ibid.*).

At the December 19 meeting, the Company submitted a complete contract proposal which omitted or modified several of the terms agreed upon by the parties at the first meeting (Pet. App. 33a, n. 4; A. 404, 426-427, 98-116). The Company proposal included a "management rights" clause which provided

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[1] "A." refers to the Appendix to the briefs in the court below.

in substance that most decisions affecting working conditions would be reserved exclusively to the Company and would not be subject to the grievance procedure; that the grievance procedure would terminate only in voluntary arbitration; and that strikes (and lockouts)—except those over a grievance for which arbitration had been refused—would be prohibited for the duration of the agreement. (Pet. App. 33a-38a; A. 98-99, 102-105, 106-107.) The Company proposal also made its work rules part of the contract, and retained its existing practices on overtime work, vacations, and holidays (Pet. App. 39a; A. 99, 431, 436, 108-109). Finally, a "zipper" clause provided that each party "unqualifiedly waives the right to request or require further collective bargaining * * * with respect to any matter or subject not specifically referred to or covered by this Agreement" (Pet. App. 38a; A. 107-108).

Although the Company proposal recited that job classifications and wage rates were "[t]o [b]e [n]egotiated" (Pet. App. 39a; A. 110), Company representatives promptly advised the Union that the Company would make no wage offer because a wage survey showed that its wages were equal to, or better than, those paid by other companies in the Jacksonville area (Pet. App. 39a; A. 437-438). The Union rejected the Company's proposed management rights, Company rules, arbitration, no-strike, and "zipper" clauses.[2] And no agreement was reached on other

[2] The Union accepted certain of the Company's proposals with some modifications. These included clauses relating to recognition, Union visitation of the plant, absenteeism, bulle-

issues, which included seniority, grievance procedures, and such economic items as call-in pay, overtime pay, holidays, and vacations (Pet. App. 39a; A. 430-439).

The next meeting did not take place until January 6, 1967, despite Union efforts to get the Company to agree to an earlier meeting (Pet. App. 39a-40a; A. 439-441). At that meeting, the parties did not significantly change their bargaining positions (Pet. App. 40a; A. 445-450). Although the Union again urged that the next meeting not be delayed, the Company would not agree to meet until January 25 (Pet. App. 40a; A. 474-475, 448). At this meeting the Company's insurance representative explained the Company's insurance and pension plan and the Company offered to increase the daily hospital room rate from $9 to $15 a day. In addition, based on a new survey, it also offered to increase the wages of four skilled classifications affecting approximately 30 of 300 unit employees (Pet. App. 40a; A. 454-457). The Company accepted some modified grievance procedure language drafted by the Union, but continued to object to any compulsory arbitration (Pet. App. 40a; A. 458-459, 124-126). The parties' positions otherwise remained essentially unchanged (Pet. App. 40a).

At the February 7 meeting, attended by a Federal mediator, the Union offered to accept the Company's

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tin boards, production work by supervisors, leaves of absence, military service, washing facilities, and safety equipment (Pet. App. 39a; A. 429-432, 435, 437-439).

management rights clause and to drop its demand for call-in pay, if the Company would increase wages 22 cents across the board, add a holiday, and increase hospital benefits to $20 per day (Pet. App. 41a; A. 480-481). The Company rejected the Union's proposals. It offered, however, to increase shift differentials by 2 cents and to give a wage increase of 8 cents across the board (Pet. App. 41a; A. 484, 486). No further progress was made and on February 26, the Union members rejected the Company's contract offer, and resolved to strike because "the Company had not bargained in good faith." The Union informed the Company that it had filed charges with the Board alleging bad faith bargaining, and that the strike, which began on February 28, was in support of those charges. (Pet. App. 41a; A. 492-493, 127-128.)

At a meeting on May 1, the Union reduced its wage request from 20 to 18 cents (Pet. App. 44a; A. 496). On May 31, the Union requested the Company to furnish the area survey data upon which it had based its offer of wage increases for four job classifications during the negotiations. The Union also requested the Company to supply the "names, job titles and rates of pay for each employee [in] the bargaining unit who is presently employed," so that the Union could assess reports reaching its office that the Company was paying striker replacements more than the strikers had earned prior to the strike. (Pet. App. 25a, 45a, n. 13; A. 139-140.) On July 31, after another Union request for the information,

the Company advised the Union that it was not paying premium rates to those currently working. Again the Union's request for specific data was ignored (A. 143, 144).[3]

At a meeting on August 7, the Union offered concessions with regard to certain of its demands, and the Company agreed to change the word "permit" to "authorize" in its no-strike clause (Pet. App. 44a-45a; A. 496-499). The following day the Union indicated that it would accept a 15-cent an hour general wage increase (Pet. App. 45a; A. 145-146). The offer apparently met with no response. But on October 2, without notice to the Union, the Company put into effect wage increases in the amount offered to the Union during bargaining negotiations (Pet. App. 45a; A. 392-394; 500-501, 400-401). No further bargaining sessions were held, and no agreement was reached.

B. The Decisions Below

1. *The initial decisions*

The Board found that the Company violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Union (Pet. App. 24a), by unilaterally increasing wage rates (Pet. App. 50a), by refusing to supply the Union within a rea-

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[3] On August 15, the Company stated that it would not furnish the names of the employees in the bargaining unit because of the "large number of instances involving violence and intimidation by strikers against employees working" (Pet. App. 25a, 50a n.20; A 74-75). The area survey information was never supplied (Pet. App. 25a, 50a; A 76-77, 499).

sonable time with copies of area wage survey data, and by refusing altogether to furnish it with information concerning the identity, wage rates, and job classifications of its employees (Pet. App. 24a-25a, 50a). The Board also found that the strike was caused by the Company's unlawful refusal to bargain, and that the Company thus violated Section 8(a)(3) and (1) of the Act by discharging, and refusing to reinstate upon their unconditional offer to return to work, the unfair labor practice strikers (Pet. App. 50a-51a). Finally, the Board found that the Company promised wage increases to employees in return for their nonsupport of the strike, in violation of Section 8(a)(1) of the Act (Pet. App. 51a-52a).[4]

The court of appeals (with one judge dissenting) remanded the case to the Board for reconsideration of its finding that the Company bargained in bad faith. The court found that "[t]here is evidence in the record from which to conclude that the Employer was not acting in good faith" (Pet. App. 10a), but held that some of the language used by the Trial Examiner, whose decision the Board adopted, suggested that the finding of bad faith may have been "based on the fact that the Board did not approve of certain of the proposals advanced by the Employer in the course of negotiations" (Pet. App. 13a). Ac-

[4] On February 28, 1967, the night the strike began, Plant Superintendent Peacock promised at least 5 employees that those who stayed at work that night would receive a 10-cent an hour raise (Pet. App. 41a; A. 263, 371-372).

cordingly, the court concluded that, "in fairness to the Employer, however reprehensible its behavior, we must remand the proceedings to the Board for reconsideration" (Pet. App. 12a).[5]

2. *The decisions after remand*

In its supplemental decision, the Board "reexamined the entire record, including the court's opinion" and reaffirmed its original decision and order (Pet. App. 5a). The Board "reviewed those portions of the Trial Examiner's Decision * * * which the court concluded led to an inference that the Company must affirmatively make concessions during bargaining," and stated that, "to the extent the language used by the Trial Examiner may so imply, we do not rely on it." The Board also expressly declined to adopt the "Trial Examiner's incorrect characterization of the 8-cent wage offer [made shortly before the strike] as not meaningful since, standing alone, it may well be construed as a reasonable offer." (Pet. App. 5a-6a.) The Board concluded (Pet. App. 6a):

> Our review of the entire record, including the disavowal of certain language noted previously, does not, however, persuade us that a different conclusion is warranted here and we still conclude that the Employer has failed to bargain in good faith based upon the following: (1) As background, the company statements prior to the representation election to the effect that the Com-

[5] The court postponed consideration of the other issues in the case "[u]ntil the Board has reconsidered the questions [raised] by this opinion" (Pet. App. 20a).

pany did not want the Union and would not sign a contract if the Union won the election; (2) the Company's failure to cooperate with the Union in scheduling bargaining sessions; (3) the Company's failure to supply the Union with wage data within a reasonable time after its request therefor; (4) the promises of wage increases to employees who did not support the strike; and (5) the Company's insistence on contract proposals which would have drastically curtailed the Union's representation rights. These proposals included a management rights provision which would have vested in management broad authority to take action affecting working conditions without consulting the Union and without subjecting such action to review in a grievance arbitration proceeding. Our inference of bad faith was and is based on the totality of the Employer's position, and not his position on any single contract provision.

The Board's order requires the Company, *inter alia*, to bargain in good faith with the Union upon request, to offer immediate and full reinstatement to the unfair labor practice strikers, and to make them whole for any loss of pay suffered because of the Company's discrimination against them. (Pet. App. 6a, 26a-27a, 55a-62a.)

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 1a-2a).

ARGUMENT

1. Petitioner contends that the "prime factor" leading to the Board's conclusion that the Company failed to bargain in good faith was the Company's insistence "on contract proposals which would have 'drastically curtailed the Union's representation rights,' " and that to predicate an unfair labor practice finding on this factor is contrary to *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, and *H. K. Porter Co.* v. *National Labor Relations Board*, 397 U.S. 99 (Pet. 6-7).

First, as shown (pp. 9-10), the Board based its finding that the Company bargained in bad faith on the totality of the Company's conduct. Thus, in addition to relying on the nature of the Company's contract proposals, the Board relied on repeated Company warnings—less than three months before bargaining commenced—that the Company would not sign a union contract or permit a union in the plant; the Company's dilatory tactics at the bargaining table; its refusal to provide and its delay in furnishing information pertinent to bargaining issues;[6] and the action of the Plant Superintendent Peacock in offering a 10-cent raise—more than the Company had offered in bargaining—to employees who would work during the strike. There is no basis for petitioner's

[6] The Board found that this conduct constituted an independent violation of Section 8(a)(5) of the Act (Pet. App. 24a-25a, 50a). The Company does not contest that finding here.

assertion that those other factors were "clearly secondary and could not, standing alone, sustain a finding of bad faith" (Pet. 8). The Board did not so characterize them; nor did the court of appeals when, in its initial opinion, it noted that "there is evidence in the record from which to conclude that the employer was not acting in good faith" (*supra*, p. 8).

Second, petitioner errs in contending (Pet. 6-8) that the Board must close its eyes to the content of a party's proposals at the bargaining table when assessing good faith or the lack of it. This Court has made clear that that determination is made by "drawing inferences from the conduct of the parties as a whole." *National Labor Relations Board* v. *Insurance Agents' Union*, 361 U.S. 477, 498. Indeed, in *American National Insurance Co., supra*, the Court acknowledged that, while insistence on a management functions clause was not a *per se* violation of the Act, the Board was not foreclosed from finding, in an appropriate case, that insistence on particular contract terms had been employed as a means of evading the obligation to bargain in good faith (343 U.S. at 409).[7]

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[7] *Chevron Oil Co.* v. *National Labor Relations Board*, 442 F. 2d 1067 (C.A. 5), is not to the contrary. There, the court found that the evidence did not support the Board's findings that the company had no intention to deal in good faith with the union or was dilatory in scheduling meetings and supplying information. The court found that the company's bargaining proposals represented only "hard bargaining" rather than, as here, a desire to avoid dealing with the union (442 F. 2d 1070-1074). Compare *Tex Tan Welhausen* v. *National*

The Board's decision is not contrary to *H. K. Porter* v. *National Labor Relations Board, supra.* There, the Court invalidated a Board order which specifically required the employer to grant the union a checkoff provision even though it had not agreed to such a proposal in collective bargaining. The Board's order here does not require the Company to agree to any particular contract provision; it merely requires the Company to bargain in good faith about terms and conditions of employment (Pet. App. 56a).

2. Petitioner's challenge (Pet. 9-12) to the Board's finding that the strike was attributable to the Company's unlawful bargaining conduct merely presents an evidentiary issue which does not warrant further review. The decision below does not, as petitioner suggests (Pet. 10), conflict with cases holding that credible evidence must support the finding that an unfair labor practice had a causal connection with a strike. The court of appeals here did not suggest that such a showing was not required and there is credible evidence to support the Board's finding. Petitioner does not dispute that "unfair labor practices preced[ed] the strike" (Pet. 10). Among those unfair practices were deliberate efforts by the Company to delay contract negotiations with the Union as well as the submission of bargaining proposals (such as the management rights provision) which, when viewed in light of its pre-election threats never to sign a

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Labor Relations Board, 434 F. 2d 405 (C.A. 5), certiorari denied, 402 U.S. 973, affirming with modification, 419 F. 2d 1265 (C.A. 5).

contract, supported the finding that petitioner did not bargain in good faith prior to the strike. The failure to so bargain, along with the uncontradicted testimony that the employees voted to strike because of the Company's bad faith bargaining tactics (*supra*, p. 6), provide sufficient evidentiary support for the Board's finding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1972

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